

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

THOMAS CHAYRA, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

v.

FAMILY DOLLAR, INC.,

Plaintiff,

Defendant.

Case No. 2:11-cv-01710-MMD-VCF

ORDER

(Defendant's Motion for Summary
Judgment and Request for Attorney's Fees
– dkt. no. 12)

Before the Court is Defendant Family Dollar, Inc.'s ("Family Dollar") Motion for Summary Judgment and Request for Attorney's Fees. (Dkt. no. 12.) For the reasons described below, the Motion is granted and the Request for Attorney's Fees is denied.

I. BACKGROUND

On or about September 30, 2011, Plaintiff Thomas Chayra entered Defendant Family Dollar's premises located at 820 E. Twain Ave., #123, Las Vegas, Nevada. Plaintiff patronized Family Dollar for the purpose of withdrawing money from an ATM machine located on Defendant's premises. As a result of withdrawing money from this ATM machine, Plaintiff was charged a surcharge fee of \$2.00. Chayra observed that there were no written notices regarding the fee displayed at a prominent or conspicuous location on or at the ATM where he intended to transfer funds, which he asserts is required under 15 U.S.C. § 1693b(d)(3)(A) and (B), the Electronic Funds Transfer Act ("EFTA").

1 Plaintiff filed his Complaint on behalf of himself and all others similarly situated on
 2 October 4, 2011.¹ Defendant now brings this Motion for Summary Judgment.

3 **II. MOTION FOR SUMMARY JUDGMENT**

4 **A. Legal Standard**

5 The purpose of summary judgment is to avoid unnecessary trials when there is no
 6 dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
 7 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings,
 8 the discovery and disclosure materials on file, and any affidavits "show there is no
 9 genuine issue as to any material fact and that the movant is entitled to judgment as a
 10 matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is "genuine"
 11 if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for
 12 the nonmoving party and a dispute is "material" if it could affect the outcome of the suit
 13 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).
 14 Where reasonable minds could differ on the material facts at issue, however, summary
 15 judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
 16 1995), *cert. denied*, 516 U.S. 1171 (1996). "The amount of evidence necessary to raise
 17 a genuine issue of material fact is enough 'to require a jury or judge to resolve the
 18 parties' differing versions of the truth at trial.'" *Aydin Corp. v. Loral Corp.*, 718 F.2d 897,
 19 902 (9th Cir. 1983) (*quoting First Nat'l Bank v. Cities Service Co.*, 391 U.S. 253, 288-89
 20 (1968)). In evaluating a summary judgment motion, a court views all facts and draws all
 21 inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v.*
 22 *Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

23 The moving party bears the burden of showing that there are no genuine issues
 24 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). "In
 25 order to carry its burden of production, the moving party must either produce evidence
 26

27
 28 ¹Despite his purported desire to file this case as a class action lawsuit (see, e.g.,
 dkt. no. 1 at 3), Plaintiff has not attempted to certify the class.

negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56's requirements, the burden shifts to the party resisting the motion to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may not rely on denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Orr v. Bank of America*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252.

B. Analysis

Defendant argues that it is not an "automated teller machine operator" under C.F.R. § 205.16(a) and is therefore not covered under the EFTA. Defendant asserts that it has identified the actual operator of the ATM as Citywide ATM, Inc. Plaintiff does not appear to dispute this fact.

1. The EFTA

"[T]he Electronic Fund Transfer Act . . . establishes the basic rights, liabilities, and responsibilities of consumers who use electronic fund transfer services and of financial institutions that offer these services. The primary objective of the act . . . is the protection of individual consumers engaging in electronic fund transfers." 12 C.F.R. § 205.1(b); see also 15 U.S.C. § 1693(b) (the purpose of the EFTA is "to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems. The primary objective of the [EFTA] . . . is the provision of individual consumer rights."). The EFTA requires ATM operators to post notice of the imposition of a fee "in a prominent and conspicuous location on or at

1 the [ATM]”, and “on the screen of the [ATM], or on a paper notice issued from such
 2 machine, after the transaction is initiated and before the consumer is irrevocably
 3 committed to completing the transaction. . . .” 15 U.S.C. § 1693b(d)(3)(B); 15 C.F.R. §
 4 205.16(c). This requirement is often referred to as “Regulation E.” See *Campbell v.*
 5 *Hope Cmtys. Credit Union*, No. 10-2649, 2012 WL 2395180, at *1 (W.D. Tenn. June 25,
 6 2012). The ATM operator may not impose a fee unless the consumer receives the
 7 above notice and “elects to continue in the manner necessary to effect the transaction
 8 after receiving such notice.” 15 U.S.C. § 1693b(d)(3) (C); 12 C.F.R. § 205.16(e).

9 **2. Whether Defendant is a “Automated Teller Machine Operator”**

10 12 C.F.R. § 205.16(a) defines an “automated teller machine operator” as “any
 11 person that operates an automated teller machine at which a consumer initiates an
 12 electronic fund transfer or a balance inquiry and that does not hold the account to or
 13 from which the transfer is made, or about which an inquiry is made.”

14 Plaintiff asserts that Defendant is, in fact, an automated machine teller operator
 15 because “Defendant controls the operation of the subject ATM machine by controlling
 16 the time that customers may enter its store to use the machine[,]” and that “[t]herefore, in
 17 essence, Family Dollar does operate the ATM and becomes an ‘automated teller
 18 machine operator’ under” the applicable regulation. (Dkt. no. 13 at 4.) Plaintiff also
 19 asserts that Defendant is an automated machine teller operator under the statute
 20 because it reaps a financial benefit from the ATM’s presence in its store, and that as a
 21 policy matter the Court should construe 12 C.F.R. § 205.16(a) as applying to the store
 22 owner because the average consumer would not know that Family Dollar does not own
 23 the ATM. (Dkt. no. 13 at 5.)

24 Defendant counters that its role was merely to passively provide a space for
 25 Citywide’s ATM machine on its premises, and as such it is not the operator of the ATM in
 26 question under the applicable regulation.

27 Neither party cites to case law construing the meaning of an owner or operator of
 28 an ATM machine for the purposes of 15 U.S.C. § 1693b(d)(3)(A) and (B).

1 The Court therefore looks to the plain meaning of “operator.” See *Shields v.*
2 *United States*, 698 F.2d 987, 989 (9th Cir. 1983) (“The primary rule of statutory
3 construction is to ascertain and give effect to the plain meaning of the language used.”
4 (citation omitted)). The Oxford English Dictionary defines operator as “[a] person
5 (professionally) engaged in performing the practical or mechanical operations of a
6 process, business, etc.” Oxford English Dictionary (2d ed. 1989). Under this definition,
7 the logical operator of the ATM must be its owner, for it is Citywide, not Family Dollar,
8 whom engages in the ATM transactions.

9 The Court’s review of the case law supports this contention. The properly-sued
10 Defendants in other cases brought under 15 U.S.C. § 1693b(d)(3)(A) and (B) were
11 financial institutions that owned the ATM machines. See, e.g., *Campbell*, 2012 WL
12 2395180; *Kinder v. United Bancorp Inc.*, 11-CV-10440, 2012 WL 4490874 (E.D. Mich.
13 Sept. 28, 2012); *Kinder v. Forcht Bank*, No. 11-233, 2011 WL 5153686 (E.D. Ky. Oct. 28,
14 2011).

15 For these reasons, the Court grants Defendant’s Motion for Summary Judgment.

16 **III. REQUEST FOR ATTORNEY’S FEES**

17 Defendant seeks recovery of attorney’s fees pursuant to 15 U.S.C. § 1693(m)f.
18 The statute states:

19 Action in bad faith or for harassment; attorney’s fees:

20 On a finding by the court that an unsuccessful action under this section
21 was brought in bad faith or for purposes of harassment, the court shall
22 award to the defendant attorney’s fees reasonable in relation to the work
expended and costs.

23 Defendant argues that Plaintiff filed this case in bad faith and for the purposes of
24 harassment. To support its argument, Defendant identifies seventeen cases filed by
25 Plaintiff asserting claims under the EFTA against retail establishments for failure to
26 provide a proper ATM fee warning notice. (Dkt. no. 12, Ex. D.) Further, Defendant
27 states that it identified Citywide as the actual owner and operator of the ATM machine on
28 its premises in its initial disclosure, and despite the early identification of the actual

1 owner/operator of the ATM machine, Plaintiff continued to litigate the case against
2 Defendant.²

3 However, Defendant fails to address how Plaintiff's actions amount to bad faith or
4 harassment. For example, Defendant does not address the status of the other
5 seventeen cases filed by Plaintiff or how they demonstrate bad faith in this case.
6 Defendant also does not discuss why Plaintiff's conduct is not merely reckless, but also
7 frivolous, harassing, or done for an improper purpose, which is required before the Court
8 can hold that Plaintiff filed this action in bad faith. See *Rodriguez v. United States*, 524
9 F.3d 704, 709 (9th Cir. 2008).

IV. CONCLUSION

11 Accordingly, IT IS ORDERED that Defendant's Motion for Summary Judgment
12 (dkt. no. 12) is GRANTED.

13 IT IS FURTHER ORDERED that Defendant's Request for Attorney's Fees and
14 Costs (dkt. no. 12) is DENIED.

DATED THIS 25th day of October 2012.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE

27 ²Defendant also asserts that Plaintiff's failure to attempt to certify the class and
28 failure to answer Defendant's written discovery constitutes bad faith.